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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

LAVON JONES, JR.,

Petitioner,

v.

BAYER HEALTHCARE LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court exercise its supervisory power over the lower federal courts by reviewing the grant of summary judgment in this employment discrimination case where there were disputed issues of fact requiring a jury trial, in light of the extensive granting of summary judgment against plaintiffs by federal courts in such cases?

2. Did the courts below improperly grant summary judgment against plaintiff with regard to his claims of retaliation and discrimination, in violation of his statutory and constitutional right to trial by jury, in light of issues of fact that a jury could have resolved in his favor?

3. Was petitioner denied his right to a jury trial guaranteed by the Seventh Amendment to the Constitution of the United States by the lower courts deciding disputed questions of fact through the improper use of summary judgment?

List of Parties

All the parties are listed in the caption.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

A. Petitioner's Employment at Bayer and His Applications for a Mechanic's Position in HVAC 6

B. The Treatment of Petitioner in HVAC 8

C. Evidence of Retaliation Against Petitioner 10

D. The Decision of the District Court ... 17

E. The Decision of the Court of Appeals 18

REASONS FOR GRANTING THE WRIT 19

I. CERTIORARI SHOULD BE GRANTED TO EXERCISE THE COURT'S SUPERVISORY POWER OVER THE LOWER FEDERAL COURTS' USE OF SUMMARY JUDGEMENT IN EMPLOYMENT DISCRIMINATION CASES 19

II. THE PRESENT CASE DEMONSTRATES THE NEED FOR THIS COURT TO REVIEW GRANTS OF SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES 27

CONCLUSION 33

APPENDIX A
MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 1, 2008 ..... App. 1

APPENDIX B
MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED MARCH 21, 2007 ..... App. 5

APPENDIX C
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING, FILED JANUARY 20, 2009 ..... App. 27

TABLE OF AUTHORITIES

Cases: *Page:*

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 24

Curtis v. Loether, 415 U.S. 189 (1973) 19, 25

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 25

Gallo v. Prudential Residential Services,
22 F.3d 1219 (2d Cir. 1994) 23

McDonnell Douglas v. Green, 411 U.S. 792 (1973) .. 25

McKennon v. Nashville Banner Corp.,
513 U.S. 352 (1995) 18, 26

McLee v. Chrysler Corp., 109 Fd 130 (2d Cir. 1997) 23

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 25

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000) 28

Riggs v. Airtrain Airways, Inc.,
497 F.3d 1108 (10th Cir. 2007) 24

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 25, 28

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 24, 26

Tomka v. The Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) 23

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 24, 25

Wood v. Pittsford Central School Dist., et al., 2008 U.S. App. Lexis 24733 (2d Cir., Dec. 8, 2008) ... 23

Constitutional Provisions:

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES ..... *passim*

Statutes:

42 U.S.C. § 1981 ..... 1, 4

42 U.S.C. § 2000e-2(a)(1)(2) 2

42 U.S.C. § 2000e-3(a) 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

Rules:

RULE 56, FED. RULES CIV. PROC. 24

RULE 10(A), RULES OF THE UNITED STATES SUPREME COURT 26

Other Authorities:

Cecil, Eyre, Miletich, and Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 861 (2007) .. 22, 23

Clermont and Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARVARD LAW & POLICY REVIEW 1, 31 (2009) 22

Clermont and Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 429 (2004) 22

FEDERAL JUDICIAL CENTER, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, August 13, 2008 ..... 19, 20, 21

Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, The Wall Street Journal, Feb. 19, 2009 26

Petitioner, Lavon Jones, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set out in Appendix A at pages App. pp. 1-4, and is unreported. The Order of the Court of Appeals denying petitioner's' petition for rehearing and rehearing en banc is set out in Appendix C at pages App. pp. 27-28, and is unreported. The decision of the United States District Court for the Northern District of California is set out in Appendix B at pages App. pp. 5-26, and is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 2008, and the order denying the timely petition for rehearing and rehearing en banc was entered on January 20, 2009. On April 8, 2009, Justice Kennedy granted petitioner's application for an extension of time to file the petition for writ of certiorari to May 20, 2009. (Appl. No. 08A870.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981provides:

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and

to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. Sec. 1977; Pub. L. 102-166, title I, Sec. 101, Nov. 21, 1991, 105 Stat. 1071.)

42 U.S.C. § 2000e-2(a)(1)(2) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(Pub. L. 88-352, title VII, Sec. 703, July 2, 1964, 78 Stat. 255; Pub. L. 92-261, Sec. 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub. L. 102-166, title I, Secs. 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

42 U.S.C. § 2000e-3(a) provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(Pub. L. 88-352, title VII, Sec. 704, July 2, 1964, 78 Stat.

257; Pub. L. 92-261, Sec. 8(c), Mar. 24, 1972, 86 Stat. 109.)

STATEMENT OF THE CASE

This case seeks review of the decision of the Court of Appeals for the Ninth Circuit in an appeal from an order entered in favor of respondent Bayer Healthcare (hereinafter "Bayer") following the granting of respondent's motion for summary judgment as to all of Petitioner's claims.

Petitioner Lavon Jones, Jr., plaintiff/appellant below, filed charges with the Equal Employment Opportunity Commission, claiming discrimination based on race, as well as retaliation for engaging in protected activities. ER 459.[1] Subsequently, he filed this action in the Northern District of California pursuant to 28 U.S.C. § 1331, raising claims of racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981, and California law.[2]

Following discovery, respondent filed a motion for summary judgment, supported by declarations and exhibits, with regard to all claims. ER 496-1143; 051-195. Petitioner filed declarations and exhibits in

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[1]Record citations are to the Excerpts of Record ("ER") filed by Petitioner in the Court of Appeals.

[2]Mr. Jones initially was one of four plaintiffs in a class action filed against Bayer Healthcare. However, the district court granted Bayer's motion to sever, and Petitioner filed his individual complaint on June 28, 2005, for damages caused by employment discrimination against the respondent. ER 1151.

opposition. ER 196-495. On March 21, 2007, the district court issued its order and judgment granting defendants' motion for summary judgment and dismissing the case in its entirety. App. pp. 5-26.

Petitioner filed a timely notice of appeal and the Court of Appeals affirmed the decision of the District Court on December 1, 2008. App. pp. 1-4. Petitioner filed a timely petition for rehearing and rehearing en banc, which was denied on January 20, 2009. App. pp. 27-28.

STATEMENT OF FACTS

Petitioner's claims of discrimination and retaliation, as explained in detail below, centered on his treatment after he applied for a position as a mechanic in Bayer's Heating, Ventilation, and Air Conditioning department (HVAC). After fighting his way into the department Mr. Jones, the only African-American mechanic, encountered difficulties and treatment significantly different than comparable Caucasian mechanics. Eventually, he filed an internal discrimination complaint with the company's human resources department and, when that was rejected, he filed with the Equal Employment Opportunity Commission.

After his EEOC complaint had been denied, Mr. Jones was subjected to disciplinary actions that culminated in his being terminated in January, 2003, for purported falsification of records, a charge he denies. The supervisor who terminated him had been named by Mr. Jones shortly before in a grievance in which it was alleged that a prior disciplinary action had been taken in retaliation for his having complained of

discrimination.

A. Petitioner's Employment at Bayer and His Applications for a Mechanic's Position in HVAC.

Petitioner Lavon Jones, Jr., was employed at the Berkeley, California, facility of Bayer Healthcare from February, 1997, until January, 2003. Declaration of Lavon Jones, Jr., in Support of Opposition to Motion for Summary Judgment (Hereinafter, "Jones Decl."), p. 1, ¶ 2; ER 452. From 1997 until early in 2001 he worked as a maintenance worker. His work record during this time was good and he was regarded as a valuable employee.

In August, 2000, Mr. Jones completed a course of study in Heating, Ventilation, Air Condition and Refrigeration. Jones Decl., p. 3, ¶ 6; ER 454. In September, 2000, he applied for a Mechanic B level position in the HVAC Department of Bayer.[3] Mr. Jones was turned down for the position and was advised to seek job leads elsewhere. Jones Decl., pp. 3-4 ¶¶ 7-8; ER 454-55. Other than Mr. Jones, no African Americans worked in HVAC as mechanics from at least

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[3]Three levels of the Mechanic position in HVAC are referred to in the discussion that follows. Mechanic C is the lowest level and is, in essence, an apprentice or training position. Mechanic B is the next level. Mechanic A is, in essence, a journeyman position and requires meeting the Mechanic B requirements as well as significant work experience in the field. After Mechanic A, an individual is eligible to be promoted to the position of Senior Mechanic.

2000 until early 2006.[4]

In late October 2000 Mr. Jones applied for a Mechanic C level position at HVAC. Jones Decl., p. 4, ¶ 9 ER 455. On this occasion Mr. Jones (and other applicants) was interviewed by all the subordinates and supervisors in HVAC, all of whom were white. Mr. Jones was the only one of the applicants with any HVAC experience. However, the position was given to a Caucasian with a chemistry background and no HVAC experience.[5] Mr. Jones contested the selection and, in his words "had to fight to obtain the position." Jones Decl., p. 4, ¶ 11. ER 455. He complained to the Union, which filed a grievance with the Bayer Human Resources department and the job was given to Mr. Jones. Jones Decl., ¶ 11. ER 455.[6]

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[4]Jones Decl., p. 4 ¶ 12 (ER 455); pp. 11-12, ¶ 34; ER 462-63. Deposition of Ronald Roberts (hereinafter "Roberts Dep.), pp. 28, ll. 13-25; 29, ll. 1-5, ER 348-49. Deposition of Richard Smith (hereinafter, "Smith Dep."), pp. 22, ll 3-5, 11-20; 23, ll 23-25; 24, ll 1-11(ER 202-04); Ex. 2 (ER 261).

[5]Jones Decl., p. 4, ¶ 10. ER 455. Roberts Dep., pp. 89, ll 11; 91, ll 24-25. ER 358; 364.

[6]Mr. Roberts, the HVAC Supervisor, attempted to impose a seventy-five day probation period under which if Mr. Jones did not meet the required performance requirements, he could be subject to disciplinary action or termination from Bayer. This requirement was not proper under the Union contract. Jones Decl., p. 4, ¶ 11. ER 455. Deposition of Sherri O'Driscoll (hereinafter "O'Driscoll Dep."), p. 27, ll 1-9, ll 18-20. ER 336.

B. The Treatment of Petitioner in HVAC.

During the entire time Mr. Jones worked in HVAC he was treated differently from the other employees in HVAC, none of whom were African American. He was not allowed to order a uniform right away but after about thirty days he eventually had to order one himself. Jones Decl., p. 4, ¶ 12. ER 455. Mr. Jones was instructed by Mr. Roberts not to handle any tools and to observe only. He was given hand-me-down tools and never received all the tools he needed to perform his job. Jones Decl., p. 4, ¶ 11. ER 455. Smith Dep., p. 76, ll 18-24; Ex. 13. ER 234-35; 273-74. Caucasians hired after Mr. Jones got a full compliment of the necessary tools within ten days of hire. Jones Decl., p. 4, ¶ 12. ER 455. Similarly, he was not given a two-way radio until several months into employment. All new hires after Mr. Jones who were Caucasian were given one immediately. Jones Decl., p. 4, ¶ 12. ER 455.

Because he was not given adequate tools or a two-way radio Mr. Jones was criticized by his Caucasian co-workers for his performance. Jones Decl., p. 5, ¶¶ 13-14. ER 456. Mr. Jones asked for a meeting because he wanted to deal with the problems he was having and establish rapport with his fellow workers, but at the meeting he was subjected to ridicule, threatening comments and disrespect from his supervisor and coworkers. Jones Decl., p. 5, ¶ 14. ER 456.[7]

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[7]In April, 2001, Mr. Jones's supervisor attempted to impose conditions on his employment. He was advised to extend his evaluation period for an additional seventy-five days and to include a class on interpersonal skills or

The subsequent hiring of Caucasians sharply contrasted with the experience of Mr. Jones. Scott Higgins came into HVAC in the summer of 2001 at a B level, higher than Mr. Jones's C level, even though he had no HVAC experience or training. Jones Decl., pp. 5-6, ¶ 17. ER 456-57. Mr. Jones had to train Mr. Higgins and help him do basic procedures that he was not familiar with. Another Caucasian, Darin Christensen, was hired at the B level but had little experience doing electrical work and did not even know how to use a voltmeter so that Mr. Jones had to show him how. Jones Decl., p. 6, ¶ 17. ER 457. A third Caucasian employee was hired into HVAC at the B level around the same time. None of these hires had to go without tools, uniforms, or unfair employment conditions. Even though Mr. Jones was promoted to B level shortly after these individuals were hired, they were offered overtime, training, and were assigned as Sub Supervisor on tasks over Mr. Jones. They were assigned tasks that would allow them to learn and advance and he was not. Jones Decl., pp. 5-6, ¶ 17. ER 456-57.

Despite his prior lack of background in HVAC, Mr. Higgins advanced rapidly at HVAC, to the A level on March 3, 2003, and to Senior Mechanic on August 29, 2005. In contrast, Mr. Jones had to go to his supervisor, Richard Smith and request that he be promoted to a

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withdraw from the position at HVAC and go back to his prior department and job. He was advised that if he withdrew from HVAC nothing negative would be added to his personnel file. Mr. Jones rejected both options and remained at HVAC. Jones Decl., p. 5, ¶ 15. ER 456.

Mechanic B position. As a result he was promoted to the B level on September 3, 2001. Jones Decl., p. 6, ¶ 19. ER 457. The documentation prepared by Mr. Smith when he approved the promotion clearly shows that Mr. Jones's work was satisfactory and justified a promotion to a higher level. Thus it states that Mr. Jones had "shown a great forward movement such as being able to troubleshot [sic] misc work orders and performs PM's with minimum assistance."[8] Mr. Jones was never promoted above the Mechanic B position.

C. Evidence of Retaliation Against Petitioner

As a result of these and other experiences, Mr. Jones exercised his rights under Bayer procedures and federal law to engage in the following protected activities. On or about May 1, 2002, he filed an internal complaint of discrimination with Bayer's Human Resources Department.[9] Human Resources conducted an investigation and a representative met with Mr. Jones and other employees in HVAC. Jones Decl., p. 8, ¶ 22. ER 459. Because of the investigation, Richard Smith, Petitioner's supervisor, "guessed" that the complaint had something to do with discrimination. Smith Dep., pp. 96, ll 308, 16-25; 97, ll 1-23. ER 242-43. The investigation was concluded with a decision by

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[8]Smith Dep., pp. 118, ll 15-25; 119 ll 1-25; 120 ll 1-8 (ER 286-88), Ex. 19. ER 310.

[9]Jones Decl., p. 8, ¶ 22. ER 459. Deposition of Joseph Gallagher (hereinafter "Gallagher Dep."), pp. 21, ll 2-9, 18-23; 26, ll 14-18. ER 382; 383.

Human Resources that no discrimination had been shown.

On or about July 3, 2002, Mr. Jones filed a complaint with the United States Equal Employment Opportunity Commission charging racial discrimination.[10] A number of HVAC employees received e-mails from Human Resources telling them that they would be interviewed by the EEOC. Jones Decl., p. 8, ¶ 22. ER 459. On December 16, 2002, the EEOC issued a decision rejecting the complaint. In December, 2002, Mr. Jones sent more documents to the EEOC and the EEOC treated this submission as a request for reconsideration. The request for reconsideration was denied on January 29, 2003. Jones Decl., p. 8, ¶ 22. ER 459.

Following the initial decision of the EEOC rejecting Mr. Jones's complaint on December 16, 2002, a series of incidents occurred that culminated in Mr. Jones being terminated. In January, 2003, Richard Smith told Mr. Jones that he would be on a team for a maintenance assignment. Mr. Jones came in at 3 a.m. with four other HVAC mechanics. After he had come in on a couple of days he realized that the assignment should have been based on seniority. Mr. Jones called Mr. Smith and left a message on his voice mail at 9 p.m. the evening before one of the shifts was to start at 3 a.m. that he would not be in. Jones Decl., pp. 8-9, ¶ 23. ER 459-60. Mr. Smith suspended Mr. Jones for three days as a result of Mr. Jones having phoned in late.

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[10]Jones Decl., p. 8, ¶ 22. ER 459. Gallagher Dep., p. 27, ll 1-11. ER 384.

As part of the suspension, Mr. Smith charged that Mr. Jones had misused overtime by working double time without prior authorization. On the occasion charged eight hours of work were scheduled. Jones Decl, p. 9, ¶ 24. ER 460. Mr. Jones was never told that double time overtime had to have prior authorization. Jones Decl., p. 9, ¶ 24. ER 460.

Mr. Jones filed a union grievance challenging the three-day suspension on January 12, 2003. In the grievance he charged that the suspension by Mr. Smith was "vindictive behavior transpired from a pending EEOC charge."[11] On January 22, 2003, a meeting was held to discuss the grievance that was attended by Mr. Gallagher and Richard Smith. Mr. Gallagher reviewed Mr. Jones's record with Mr. Smith and discussed Mr. Jones's discrimination charges.[12]

On or about January 23, 2003, Mr. Jones was given an assignment to change filters on air conditioning and air handling units on the roofs of certain buildings. Jones Decl., p. 9, ¶ 26. ER 460. The job was more than a one-man, one-day job, but Mr. Jones was told that it had to be finished by him on January 24, 2003

On the morning of January 24, 2003, the day the filter job had to be finished, Mr. Jones was paged by Joe Haberstroh, a co-worker, telling him that Richard

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[11]Jones Decl., p. 9, ¶ 25 (ER 460); Gallagher Dep., p. 39, ll 13-25 (ER 387), Ex. 8. ER 412.

[12] Gallagher Dep. pp. 28, ll 23-25; 29, ll 3-14; 42, ll 19-25; 43, ll 20-25; 44, ll 1-15. ER 385-86; 390-91; 393.

Smith, who was in a meeting and not reachable, had told Mr. Haberstroh to tell Mr. Jones to come help him on a job. Jones Decl., p. 9, ¶ 27. ER 460. Just before Mr. Jones got the call from Mr. Haberstroh, a union representative had called him and told him that there was a noon meeting that same day with all of his co-workers. Mr. Jones called Mr. Gallagher in Human Resources and asked to meet him so that a representative from Human Resources could be at the noon meeting since Mr. Jones would be the only African American there. Mr. Gallagher told Mr. Jones to come and see him at 10:30 am. Jones Decl., p. 9, ¶ 27. ER 460. Mr. Jones told Joe Haberstroh that he had a meeting with Mr. Gallagher and asked him whether it was all right to meet with Mr. Gallagher. Mr. Haberstroh said it was all right. Jones Decl., pp. 9-10, ¶27. ER 460-61.

Mr. Jones went to Mr. Gallagher in Human Resources and asked him to come to the meeting at noon. Mr. Gallagher said no one from Human Resources needed to be there since only union personnel would be present. Jones Decl., p. 10, ¶ 28. ER 461. Mr. Jones denied that Mr. Gallagher told him that he had to get permission before he went to meet Mr. Gallagher. Jones Decl., p. 10, ¶ 28. ER 461. In any event, he had asked Mr. Haberstroh, who was in charge of the job he had been assigned to that morning, if it was all right to go to Human Resources and Mr. Haberstroh had given his approval. Jones Decl., p. 10, ¶ 28. ER 461.[13]

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[13] After Mr. Jones met with Mr. Gallagher he went back to help Mr. Haberstroh and Mr. Higgins. When Mr.

Richard Smith testified that during the morning of January 24 he had gone to the roof, ostensibly to check on Mr. Jones's work in connection with Mr. Jones's request to be promoted to grade A. He claimed that he saw that one of the filters was dirty and that later in the day he returned to the roof and took pictures of the units.[14] In direct contradiction to Mr. Smith's testimony, James Jewell testified that Mr. Smith had sent him, Mr. Jewell, to the roof that afternoon to take the pictures.[15]

Mr. Jones went to the meeting at noon. Even though Mr. Gallagher had told him only union personnel would be there, Richard Smith, the supervisor, was also there. A number of the Caucasian members in the work group were hostile towards Mr. Jones and they had requested an urgent meeting to question him on why he had filed a complaint with the EEOC and a grievance with Human Resources. Richard Smith elaborated and asked why Mr. Jones had gone to HR and the EEOC, and said Mr. Jones should have come to the group. Joe Haberstroh said to Mr. Jones that he would "never trust your ass again." Scott Higgins asked why Mr.

Jones got to the area the job was completed and he was not needed. Jones Decl., p. 10, ¶ 28. ER 461.

[14]Smith Dep., pp. 148, ll 12-25; 149, ll 1-7; 150, ll 12-19; 153 ll. 14-16, 22-25; 154, ll 1-15 (ER 291-94), Exhibit 26. ER 319-23.

[15]Deposition of James Jewell (hereinafter, "Jewell Dep."), pp. 29, ll 15-25; 30, ll 1-7; ll 15-21 (ER 426-27), Ex. 2 (ER 445-48).

Jones filed an EEOC charge, and "what discrimination?" Another person said that people were on edge because Mr. Jones had filed the charge and a person from refrigeration said that he could understand what the other workers were saying about filing charges and that there must be other ways. Richard Smith said nothing in Mr. Jones's defense but supported what the others were saying. Jones Decl., pp. 10-11; ¶ 29. ER 461-62.

After the meeting Mr. Jones went to finish the filter changing assignment. James Jewell paged him up to as many as four times and asked him whether he had finished the job. Mr. Jewell said that Richard Smith wanted to know if the job was finished. Mr. Jewell pressed Mr. Jones to finish on that day and stood with him while he finished and signed off on the work order so that Mr. Jewell could carry it back to Richard Smith. Jones Decl., p. 11, ¶ 30. ER 462. Mr. Jones states that there was no need for the rush to get the paper work. Mr. Jones's practice was to spend additional time to go over the paperwork and ensure that everything was correct before turning it in. Jones Decl., p. 11, ¶ 30. ER 462.[16]

Richard Smith never asked Mr. Jones about the filters or talked to him about any dirty filters that were

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[16]When Mr. Jones was finished he discarded the dirty filters. However, when he had been called away to work with Mr. Haberstroh the morning of January 24 he had left a box of dirty filters in the work area since he had not finished the job. The dirty filters could have been accessed by anyone. Jones Decl., p. 11, ¶ 31. ER 462.

still on a unit. Mr. Smith never asked him whether he had finished the job, only Mr. Jewell did. Mr. Smith did not talk to Mr. Jones on January 24 or on January 27 about the filter job, and he had never checked behind Mr. Jones's work before this time. Jones Decl, p. 11, ¶ 31. ER 462.

On January 28, 2003, Petitioner was called to Human Resources, and told he was fired. He was terminated for two purported reasons: (1) he had falsified records by stating that he had changed all the filters; and (2) he had met with Mr. Gallagher without having gotten prior approval to leave his assigned job. Mr. Gallagher, Mr. Smith, Mr. Nitze, and a union representative were there. Mr. Jones had no prior knowledge that he was going to be fired, no one had talked to him, and he was not asked to give any statement regarding the allegations against him. Jones Decl., p. 11, ¶ 33. ER 462. Mr. Gallagher testified that Mr. Jones was not asked for an explanation because "it was an information meeting. It was not an investigatory meeting." In contrast, Mr. Smith claimed that Mr. Jones was asked for an explanation during this meeting.[17]

Mr. Gallagher, who approved the termination of Mr. Jones, testified that he was sure that Mr. Smith had spoken to Mr. Jones about the filter job *before* the January 28 meeting and had asked Mr. Jones what had happened because that was the procedure to be followed, although he could not say that he was present

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[17]Gallagher Dep., p. 61, ll 10-17. ER 400. Smith Dep., pp. 166, ll 23-25; 167, ll 1-14. ER 306-07.

during such a conversation. Mr. Smith, on the other hand, testified that he had not spoken to Mr. Jones before going to Mr. Gallagher and gotten approval to fire Mr. Jones.[18]

Mr. Smith was questioned concerning a Bayer protocol that differentiated between "deliberate misrepresentation" and an error. Despite the language of the directive, Mr. Smith acknowledged that he never questioned Mr. Jones to find out whether he had made a mistake on the work order form rather than a deliberate misrepresentation.[19] Petitioner stated unequivocally in his declaration in opposition to the motion for summary judgment that he did not falsify any records, and that he was sure that he changed all of the filters. Jones Decl., p. 9, ¶ 26. ER 460.

D. The Decision of the District Court

In its decision, the district court first held that Petitioner had not established a *prima facie* case with regard to his claim of discrimination. In so holding, the court focused almost entirely on Mr. Jones's not having been promoted to a level A mechanic. App. pp. 12-19. The court held that a *prima facie* case of retaliation had not been established because Mr. Jones had been terminated in January, 2003, more than six months after he had filed his initial complaint of discrimination. App.

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[18]Gallagher Dep., pp. 61, ll 18-25; 62, ll 1-25; 63, ll 1-25; 64, ll 1-25. ER 400-03. Smith Dep., pp. 150, ll 8-25; 151, ll 11-15; pp. 166, ll 23-25; 167, ll 1-14. ER 293-94; 306-07.

[19]Smith Dep., p. 152, ll 5-11, (ER 295) Ex. 25; p. 152, ll 12-16. ER 295; 318.

pp. 22-24. In so holding, the court did not mention or discuss the fact that Mr. Jones had filed a grievance claiming retaliation because he had filed an EEO charge earlier in January, 2003, and that a meeting had been held on the grievance a week before his termination. Nor did the court mention the meeting on January 24 at which Petitioner was criticized by his supervisor and co-workers for having filed discrimination complaints. *Cf.* App. pp. 22-24.

With regard to both claims, the court held that even if a *prima facie* case had been established, Petitioner had failed to establish pretext. App. pp 19-22; 24.[20]

E. The Decision of the Court of Appeals

The Ninth Circuit summarily affirmed with an unpublished opinion. App. pp. 1-4. With regard to the retaliation claim, the Court evidently concluded that Petitioner had made out a *prima facie* case. However, the Court also held that the Respondent had met its burden of introducing evidence of a legitimate, non-discriminatory reason, and that the Petitioner had not demonstrated pretext. As will be discussed below, in

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[20]The district court also held, as an alternative basis for dismissing the case, that after-acquired evidence that purported to establish that Mr. Jones had given misinformation on his original job application required that Mr. Jones's claims of both discrimination and retaliation be denied in their totality. App 24-25. Petitioner appealed this holding as being inconsistent with this Court's decision in *McKennon v. Nashville Banner Corp.*, 513 U.S. 352 (1995). The Court of Appeals did not reach this question.

its decision the Court of Appeals made a number of factual statements that were either unsupported in the record or that conflicted with evidence that the Petitioner had introduced in opposition to the motion for summary judgment. With regard to the discrimination claim, the Court of Appeals affirmed both of the District Court's holdings that Petitioner had failed to establish a *prima facie* case. App. p. 2.

Petitioner filed a timely petition for rehearing and rehearing en banc. The petition was denied, thus occasioning this petition for writ of certiorari. App. pp. 27-28.

Reasons for Granting the Writ

I.

Certiorari Should Be Granted to Exercise the Court's Supervisory Power Over the Lower Federal Courts' Use of Summary Judgement in Employment Discrimination Cases

The Civil Rights Act of 1991 amended Title VII to provide for jury trials for compensatory and punitive damages. And, of course, the right to a jury trial in such actions is guaranteed by the Seventh Amendment to the Constitution. *See, Curtis v. Loether*, 415 U.S. 189 (1973). However, as a recent study by the Federal Judicial Center found, summary judgment is granted against plaintiffs in employment discrimination far more often than in any other category of cases in the federal courts. Federal Judicial Center, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* August 13, 2008 (hereinafter

"FJC Report").[21]

The study examined all summary judgment motions filed in federal district courts in Fiscal Year 2006. Among its findings were the following. Ninety per cent of the summary judgment motions filed in employment discriminations cases were filed by defendants.[22] Moreover, defendants filed summary judgment motions in between thirty-four and thirty-seven percent while plaintiffs filed motions in only three percent of such cases.[23] In sharp contrast, defendants filed summary judgment motions in only nine to fourteen percent of contract and torts cases.[24]

In employment discrimination cases, thirty-five to forty-six percent of summary judgment motions were granted in whole or in part, with only twelve to

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[21]The report can be accessed at http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf.

[22]In contrast, in contract cases 56% of summary judgment motions were filed by defendants; in tort cases, 85% of the motions were filed by defendants. FJC Report, Table 1, p. 6.

[23]FJC Report, Tables 7 & 8, pp. 12-13. Plaintiffs filed summary judgment motions in only five to six percent of all cases. The range of cases in which motions were filed reflects differences in local district court rules as to whether a structured format is required for filing such motions. In general, motions were filed in a larger percentage of cases in courts that did not require a structured format.

[24]FJC Report, Table 7, p. 12.

fourteen percent denied and another fifty-five to sixty percent with no disposition.[25] For those summary judgment motions acted upon, seventy-four to seventy-seven percent were granted in employment discrimination cases.[26]

Most tellingly, between eleven and fifteen percent of employment discrimination cases were disposed of by summary judgment, in sharp contrast with contracts and torts cases, where only three to four and one to three per cent, respectively, of the cases were so disposed of. FCJ Report Table 13, p. 17. Since defendants filed the vast majority of summary judgment motions in employment cases, virtually all of the cases disposed of by summary judgment and, therefore, without a trial, were decided in favor of defendants.

These results were consistent with other studies, all of which found that in federal courts summary judgment motions were granted much more often in civil rights cases, particularly employment

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[25]FJC Report, Table 3, p. 8. The comparable figures for con tract cases were twenty-two to twenty six percent granted in whole or in part, sixteen to eighteen percent denied, and fifty-five to sixty-four percent with no disposition. For torts cases, the figures were twenty-one to twenty-six percent, sixteen to seventeen percent, and fifty-five to sixty percent, respectively.

[26]FJC Report, Table 4, p. 9. The figures for summary judgment motions granted in contract cases were fifty-five to fifty-nine percent and in torts cases, fifty-six to sixty-one percent. *Ibid.*

discrimination cases, than in other categories of litigation. *See, e.g.*, Clermont and Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 429 (2004); Cecil, Eyre, Miletich, and Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 861 (2007); Clermont and Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARVARD LAW & POLICY REVIEW 1, 31 (2009) (noting that "the difference in win rates between jobs cases and nonjobs cases shows that pretrial adjudication particularly disfavors employment discrimination plaintiffs").

The high level of disposition of employment discrimination cases by summary judgment has continued since the time period covered by the Federal Judicial Center. Counsel for Petitioner has reviewed cases reported in Fair Employment Practices Cases, published by the Bureau of National Affairs, in the periods July, 2007, to November, 2007, and April 2008 to August 2008, covered by volumes 101 and 103 of FEP Cases respectively. In the first period, courts of appeals affirmed sixty-five grants of summary judgment by district courts and reversed only fourteen. In the second time period, the appellate courts affirmed fifty-seven grants of summary judgment and reversed twenty-two.[27]

Commentators have also noted that summary

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[27] In a few of these cases the court of appeals affirmed the grant of summary judgment in part and reversed in part.

judgment motions have fared differently in different federal districts and circuits. Thus, Cecil, Eyre, Miletich, and Rindskopf, *op. cit. supra* examined summary judgment results in six district courts. They found marked differences between the Southern District of New York and the other five districts. 4 JOURNAL OF EMPIRICAL LEGAL STUDIES at 896-97. The Southern District "appears to have a consistently lower rate of summary judgment activity" than the other courts. Although the authors commented on the efforts of the Second Circuit to "dispel the notion that it is not receptive to summary judgment" (*id.*), they did not note decisions in the Second Circuit that scrutinized grants of summary judgment in employment discrimination cases carefully. Thus, the court has warned that caution must be exercised in granting summary judgment where an employer's intent is at issue. *See, e.g., Tomka v. The Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224 (2d Cir. 1994); *see also, Wood v. Pittsford Central School Dist., et al.*, 2008 U.S. App. Lexis 24733 (2d Cir., Dec. 8, 2008) (holding that "We exercise caution when granting summary judgment if motive is genuinely in issue" citing *Gallo* and *McLee v. Chrysler Corp.*, 109 Fd 130, 135 (2d Cir. 1997))

Particularly noteworthy is the almost total absence in the reported decisions of discussion of the implications of the Seventh Amendment's right to a jury trial for a determination of motions for summary

judgment.[28] Petitioner does not, of course, mean to suggest that summary judgment, as provided for in Rule 56, itself violates the Seventh Amendment.[29] However, the Seventh Amendment does guarantee the right to have a jury determine issues of fact, including "the elusive factual question of intentional discrimination."[30] As the Court has recognized, the "question facing triers of fact in discrimination cases is both sensitive and difficult".[31] And a plaintiff has the right to its determination by the *proper* factfinder based

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[28] *See, Riggs v. Airtrain Airways, Inc.*, 497 F.3d 1108 (10th Cir. 2007) (affirming grant of summary judgment), for one of the few appellate decisions discussing the Seventh Amendment.

[29] As the Court held in *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986):

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

[30] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981)

[31] *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

on the facts looked at in their totality.[32]

The importance of the proper standard to be applied in determining whether to grant summary judgment in employment discrimination cases can not be minimized. This Court held, in *Curtis v. Loether*, *supra*, that the right to jury trial was required in civil rights cases where damages are at issue, and Congress made the deliberate decision to provide for jury trials in all employment discrimination cases where damages are sought. This Court has repeatedly cautioned the lower federal courts that its decisions setting forth various methods of analyzing and deciding employment discrimination cases are not to be applied in a mechanical fashion.[33] Rather, it is crucial that the fact-finder – the jury in cases where damages are sought – consider claims of intentional discrimination based on all of the facts "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation

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[32] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993)

[33] Thus, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) this Court stated that the method of analysis set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), "was never intended to be rigid, mechanized, or ritualistic." In other decisions the Court has emphasized that there is no fixed or single method of establishing intentional racial discrimination. *See, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) (lower courts erred in limiting Plaintiff to one method of establishing pretext).

is pretextual."[34]

The widespread and often uncritical use of summary judgment, unaccompanied by consideration of the restraints imposed by the Seventh Amendment, threatens to undermine the decisions of this Court that have repeatedly emphasized the critical importance of vigorous enforcement of Title VII so as to carry out policies that are of paramount national importance. *See, McKennon v. Nashville Banner Publishing Co*, 513 U.S. 352, 357 (1996), and cases there cited. Moreover, the improper and widespread denial to individual plaintiffs of their rightful opportunity to have their claims heard by a jury of their fellow citizens can only lead to a loss of faith in an respect for the law.

The studies and articles cited above demonstrate that there is great concern and interest over whether employment discrimination cases are being decided against plaintiffs disproportionately and improperly.[35] For these reasons, it is the greatest importance that this Court take this opportunity to exercise its supervisory power over the lower federal courts pursuant to Supreme Court Rule 10(a) and enunciate standards to guide the lower federal courts in deciding motions for summary judgment in employment discrimination cases. In particular, the Court should re-

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[34] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10 (1981)

[35] *See*, Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, The Wall Street Journal, Feb. 19, 2009.

emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions and require that the lower courts adopt the Second Circuit's requirement and exercise caution in granting summary judgment when an employer's intent is at issue.

II.

THE PRESENT CASE DEMONSTRATES THE NEED FOR THIS COURT TO REVIEW GRANTS OF SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

The present case exemplifies the need for review of the question of whether summary judgment is being used improperly and the for the establishment of standards for its use. For the purpose of this petition, we will focus on the decision of the lower courts on the issue of retaliation.

The District Court clearly resolved a number of disputed and material facts when it held both that the Petitioner had not introduced evidence that could establish a *prima facie* case of retaliation and that he had not proffered evidence from which a jury could have inferred that the reason advanced by the Respondent was a pretext for retaliation.

First, with regard to the *prima facie* case, the District Court held that there had been too long a gap between the date when Petitioner filed his charge of discrimination with the EEOC and time he was fired. In so doing, the District Court overlooked or ignored the evidence that petitioner had complained, in a union grievance that his supervisor was aware of, that he had been disciplined in retaliation for his having filed with the EEOC. It was less than a month after Petitioner

had filed this grievance, and less than a week after the meeting at which his fellow co-workers and the same supervisor berated him for having filed the EEOC charge, that he was terminated.

Second, with regard to pretext, the District Court disregarded evidence, some of which was undisputed, of conflicts of testimony of management officials regarding the events that led up to Petitioner's termination, including whether he was ever asked for an explanation for the alleged failure to change all of the filters in the air-conditioning units, from which a jury could have chosen to disbelieve the employer's version of the events.[36] The District Court also disregarded the undisputed evidence that the supervisor who had both

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[36]As this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993):

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required ". . . . .

See also, Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000) (jury's disbelief of the reasons proffered by the employer is a sufficient basis for a finding of discrimination).

been charged by Petitioner with retaliation and who had initiated Petitioner's termination, had not asked Petitioner whether the alleged error in paperwork was a mistake or a deliberate falsification, despite the clear company policy requiring that the distinction be made.

The Court of Appeals similarly either disregarded evidence in the record or misstated the record, all of which errors were brought to the attention of the panel in the petition for rehearing.

Thus, the Court stated that:

> Jones did not allege that Smith himself made any hostile comments at the meeting, or that Smith communicated what transpired at the meeting to management personnel responsible for termination decisions. App. p. 3.

However, the record is clear and undisputed that *Mr. Smith himself* was responsible for and initiated the decision to terminate Mr. Jones immediately after the January 24, 2003, meeting at which plaintiff/appellant was upbraided by his fellow workers for filing a complaint with the EEOC and at which Mr. Smith agreed with the criticisms.[37]

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[37]Thus, in his declaration in support of summary judgment, Mr. Smith stated:

> It was agreed that Mr. Jones would be terminated for cause. The bases for *my decision* were summarized in my January 27, 2003 memorandum to Joe Gallagher, a true and correct copy of which is appended hereto

The Court further stated "that there were numerous legitimate, non-retaliatory reasons for Jones' termination." However, in fact, he had no such problems before he fought his way into HVAC, where he was the only African-American mechanic. The Court further cites his "decision to work unauthorized overtime on January 5, 2003" and his failure to report to work on a time-controlled assignment on January 6, 2003." However, Mr. Jones was disciplined by a three-day suspension for the incidents on January 5 and 6. There is nothing in the record that suggests that without the events of January 24, 2003, he would have been disciplined further, let alone terminated because of the January 5 and 6 events.

Most important, the Court seriously misapprehended the record when it accepted as established Bayer's allegations that Jones was guilty of "abandonment of job duties on January 24, 2003" and of "document falsification involving a filter changing project also on January 24." App. p. 3. These two allegations, both of which were consistently and vigorously denied by Mr. Jones, were the bases of his termination. Thus, they cannot be characterized as "legitimate" except by accepting as true Bayer's contention that Mr. Jones was guilty of either or both infractions.

Of course, it is precisely the duty of the jury, as the fact-finder, to determine who was telling the truth,

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as Exhibit "E".

ER pp. 535; 548-49 (emphasis added).

Mr. Jones, Mr. Smith, or Mr. Gallagher. If the jury believes Mr. Jones, there would be ample basis for it to conclude that the actions were not "legitimate" but were taken to retaliate against Mr. Jones for his filing both internal and external complaints charging discrimination and retaliation.

Finally, the Court stated that the "only competent evidence" Mr. Jones offered on the issue of pretext was the meeting of January 24, 2003. This conclusion also misapprehended the record. There were a series of events surrounding the termination of Mr. Jones that were established by competent evidence in the form of documents and testimony that could support a jury's determination that Mr. Jones's rights not to be retaliated against had been violated. They may summarized thus:

> 1. The failure of Mr. Smith to take any steps, including questioning Mr. Jones, to determine whether any purported misstatement in the documents prepared by Mr. Jones was inadvertent or was a deliberate misrepresentation, as clearly required by Bayer directives;
>
> 2. Conflicts in testimony between Mr. Smith and Mr. Jewell as to who checked up on Mr. Jones's work on January 24;
>
> 3. Conflicts in testimony between Mr. Smith and Mr. Gallagher as to whether Mr. Jones was ever questioned about the air filter job;
>
> 4. Mr. Jones's denial that he deliberately falsified the documents and his contention that he believes he changed all of the filters;

5. Mr. Jones's denial that Mr. Gallagher told him to get permission from his supervisor to meet with Mr. Gallagher;

6. The fact that Mr. Jones was the only African-American in HVAC, together with the difficulties he experienced in getting the HVAC job in the first place and the hostility towards him and attendant difficulties with his white co-workers, that culminated in the meeting on January 24, 2003, at which he was criticized for having exercised his rights to file claims of discrimination. A jury could conclude that Mr. Jones was seen as a malcontent and trouble-maker who should be gotten rid of because of his co-workers' anger and hostility.

In summary, the present case presents a clear example of the erroneous use of summary judgment to decide an employment discrimination case where a jury, after hearing all of the evidence, is the only proper finder of fact under the Seventh Amendment. Thus, it provides an appropriate opportunity for the Court to give guidance to the lower federal courts as to the proper standards to be applied in deciding motions for summary judgment in such cases.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully Submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVON JONES, Jr.,

Plaintiff - Appellant,

and

NATHANIEL WOODS, JR; HABEN BERBANE; DWIGHT DOVE

Plaintiffs

v.

BAYER HEALTHCARE LLC; BAYER CORPORATION,

Defendants - Appellees

No. 07-15555
D.C. No. CV-03-05531-JSW
MEMORANDUM*

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

App. 2

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted October 24, 2008
San Francisco, California

Filed December 1, 2008

Before: WALLACE, THOMAS and GRABER,
Circuit Judges.

Jones appeals from the district court's summary judgment entered in favor of Bayer Healthcare LLC (Bayer) on Jones' claims of employment discrimination based on race and retaliation in employment. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Jones did not establish a prima facie case of discrimination in his employment discrimination claim. He provided no evidence that he was performing his job according to Bayer's legitimate expectations during the relevant time period, and he did not identify similarly situated employees outside the protected class who received more favorable treatment than he received. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Summary judgment to Bayer was therefore proper.

Jones did not demonstrate a genuine issue of material fact on the issue of pretext on his retaliation claim. The only competent evidence Jones offered on the issue of pretext was a January 24, 2003 union meeting, during which his coworkers allegedly made hostile comments regarding the fact that he had filed various internal grievances and discrimination complaints. Jones alleged that his supervisor, Richard Smith, was present at the meeting, and "said he could understand what everyone was saying and that filing grievances did not make any sense." Jones also alleged that Smith "said nothing in my defense but supported what the others were saying." However, Jones did not allege that Smith himself made any hostile comments at the meeting, or that Smith communicated what transpired at the meeting to management personnel responsible for termination decisions.

By contrast, the record demonstrates that there were numerous legitimate, non-retaliatory reasons for Jones' termination, including Jones' history of disciplinary problems and unsatisfactory job performance reports; his decision to work unauthorized overtime on January 5, 2003; his failure to report to work on a time-controlled assignment on January 6, 2003; his abandonment of job duties on January 24, 2003; and an incident of document falsification involving a filter changing project also on January 24. Given these legitimate and particularized bases for termination, the fact that one of Jones' supervisors participated in a single allegedly hostile union meeting

is insufficient evidence of pretext to survive summary judgment. *Manatt v. Bank of Am., NA*, 339 F.3d 792, 801, 803 (9th Cir. 2003) (rejecting retaliation claim where employer offered legitimate, nondiscriminatory reasons for termination).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

LAVON JONES, JR.,

Plaintiff,
v.

BAYER HEALTHCARE LLC,

Defendant.

No. C 03-05531 JSW

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

Now before the Court is the motion for summary judgment filed by Defendant Bayer Healthcare LLC ("Bayer"). Having carefully considered the parties' arguments, the relevant legal authority, and having had the benefit of oral argument, the Court hereby GRANTS Defendant's motion for summary judgment.

BACKGROUND

Plaintiff brings suit against Bayer alleging race discrimination under Title VII of the Civil Rights Act

of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2(a)(1)(2) (claim one); retaliation in violation of 42 U.S.C. §§ 2000e-3(a) (claim two); race discrimination – termination – in violation of 42 U.S.C. § 1981 (claim three); retaliation – race – in violation of 42 U.S.C. § 1981 (claim four); race discrimination – promotion – in violation of 42 U.S.C. § 1981 (claim five); race discrimination – termination - in violation of California Government Code § 12940(a) (claim six); retaliation in violation of California Government Code § 12940(h)(1) (claim seven); and violation of public policy in violation of Article I, Section 8 of the California Constitution and California Government Code §§ 12920 & 12940(a) (claim eight).

Plaintiff was employed by Bayer in its Berkeley facility for approximately five years as a general worker and mechanic. The main pharmaceutical product manufactured at Bayer's Berkeley facility is Kogenate FS, a clotting agent principally used by hemophiliacs to help clot their blood. (*See* Declaration of Peter Kramer at ¶ 3.) Bayer must follow rigorous internal operating procedures as well as follow the mandates of Federal Regulations and subject itself to regulatory audits. (*See id.* at ¶ 5.)

On his application materials, Plaintiff misrepresented the name of the high school he attended and misrepresented that he spent a year in college. (Declaration of Jerome Schreibstein "Schreibstein Decl.") at Ex. B at JON0525; Declaration

of Lavon Jones ("Jones Decl.") at ¶ 3.) Bayer's employment application, signed and acknowledged by Plaintiff, contained a provision that regardless of when a misrepresentation in the application materials was discovered, it would be grounds for disciplinary action, up to and including termination. (Schreibstein Decl., Ex. B at JON0441.) As a heavily regulated manufacturer of pharmaceutical products, Bayer has a zero tolerance policy for document falsification applicable in the personnel context. It is settled policy at Bayer that misrepresentation in the employment application process is sufficient grounds for termination. (Declaration of Sherri O'Driscoll at ¶ 3; Declaration of Joseph M. Gallagher at ¶ 3.)

Plaintiff was employed by Bayer as a General Worker starting in February 1997 and continued in various positions, as a janitor and an Equipment Sterilizer Washer. (*See* Shreibstein Decl., Ex. A at 29, 46-51.) In September 2000, without any previous work experience in the field, Plaintiff completed a course on climate control and refrigeration which was the only refrigeration training he had completed. (*See id.* at 55-59.) Shortly after receiving the certificate, Plaintiff applied for a position as a C-level mechanic in Bayer's HVAC (heating, ventilation and air conditioning systems) department. (*See id.* at 82-83.) After the position was offered to a Caucasian applicant, Plaintiff contested the selection by complaining to the Union and filing a grievance with Bayer's Human Resources Department. (*See* Jones Decl. at ¶ 11.) Due to his Union

seniority and his related technical training, Plaintiff was given the position beginning February 2001. (*See* Schreibstein Decl., Ex. A at 119; Declaration of Ron Roberts ("Roberts Decl.") at ¶ 4.)

Plaintiff contends that during his tenure in the HVAC Department, he was treated differently from other, non-African American employees because of a delay in ordering his uniform, the failure timely to provide him with tools and failing to give him a two-way radio. (*See* Jones Decl. at ¶ 12.) Plaintiff also contends that he was assigned to work with someone who was moody and hard to work with and he was therefore unable to learn more on the job. (*See id.* at ¶ 13.) During his probationary period, Plaintiff's supervisor reported that several fellow mechanics had complained about Plaintiff's performance, his lack of concentration on instructions, excessive use of cell phones and beepers for personal use, and lengthy disappearances from the work site. The supervisor suggested classes to help with Plaintiff's interpersonal skills, but Plaintiff insisted upon a group meeting during which he felt criticized by his fellow employees. (*See* Roberts Decl. at ¶¶ 9-10; Schreibstein Decl., Ex. A at 122-30.) Plaintiff felt that the criticisms of his performance were the product of discriminatory motive, but proffers no evidence to support his subjective perception. (*See* Schreibstein Decl., Ex. A at 128-130.)

After Plaintiff's promotion to B level mechanic,

complaints about his work continued. Such complaints included a confrontational altercation with another mechanic, repeated complaints about Plaintiff's poor attitude and work performance from co-workers, Plaintiff's failure to follow strict company policy on equipment release and lockout/tagout procedures, his missing days of work and failing to show up for a particular, time-sensitive work assignment. (*See, e.g.*, Declaration of Richard Smith ("Smith Decl.") at ¶¶ 6-8; Schreibstein Decl., Ex. A at 165-68.)

On June 24, 2002, Plaintiff filed a complaint before the United States Equal Opportunity Commission ("EEOC") alleging discrimination on account of his race. (*See* Schreibstein Decl., Ex. C at JON0060.) In his complaint, Plaintiff alleged that he was denied access to tools, training and the internet. (*See id.*) On December 16, 2002, the EEOC dismissed the charges based on lack of evidence. (*See id.*, Ex. D at JON0057.) On the same day, Plaintiff submitted additional materials before the EEOC, but as the deadline for submission had passed, the EEOC treated the submission as a request for reconsideration, which was denied as insufficient in January 2003. (*See id.* at Ex. A at 389-390, 392-93.)

When, in January 2003, Plaintiff inquired about possible promotion, his supervisor evaluated Plaintiff's performance on the changing of a fan unit filter. His supervisor determined that Plaintiff had completed the paperwork indicating the filters had been changed, but

could not account for the fact that, upon visual inspection, it appeared that there remained dirty filters in the unit. (*See* Schreibstein Decl., Ex. A at 203-209, 223-24, Ex. B at JON1715-16, JON1717; Smith Decl. at ¶¶ 14-15.)

Based on Plaintiff's past disciplinary problems, including interpersonal issues and work performance, his abandonment of the job when called upon for special assignment, and the possible serious document violation relative to the filter maintenance, Plaintiff was terminated from employment effective January 27, 2003. (Smith Decl. at ¶ 15, Ex. E at JON0625-26.) Although Plaintiff maintains that the unfulfilled promotion request and termination were racially motivated, Plaintiff was unable to identify at deposition any statement, comments, or particular actions that would indicate racial animus. (Schreibstein Decl., Ex. A at 128-130, 220-221, 228-235.) Further, Plaintiff was unable to proffer any evidence of retaliatory motive on Bayer's part. (*See id.* at 358-376.)

The Court will address the additional specific facts as required in the analysis.

ANALYSIS

A. Standards Applicable to Motions for Summary Judgment.

A principal purpose of the summary judgment

procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210

F.3d 1099, 1102 (9th Cir.2000). Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own evidence, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact must take care adequately to point a court to the evidence precluding summary judgment because a court is "'not required to comb the record to find some reason to deny a motion for summary judgment.'" *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Plaintiff's Claims for Race Discrimination Do Not Survive Summary Judgment.

Plaintiff brings his first, third, fifth and sixth claims for race discrimination and contends that Bayer failed to promote him and terminated him based on his membership in a protected class. In order to make a claim for discrimination, Plaintiff must establish that

he suffered an adverse employment action that was motivated by intentional discriminatory animus. *See, e.g., Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 353-58 (2000). The proper legal framework for determining whether Plaintiff's claim should survive summary judgment is the familiar burden shifting scheme set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

First, Plaintiff must establish a prima facie case of discrimination. *See id.*; *Guz*, 24 Cal. 4th at 351-54. Whether Plaintiff can meet his burden to establish a prima facie case of discrimination is a matter of law to be determined by the court. *Caldwell v. Paramount Unified School District*, 41 Cal. App. 4th 189, 201 (1995). If Plaintiff establishes a prima facie case, the burden then shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Then, in order to prevail, Plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision was a pretext for another, discriminatory motive. *See Guz*, 24 Cal. 4th at 351-54; *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Plaintiff may establish a prima facie case of discrimination by demonstrating that (1) he belongs to a statutorily protected class; (2) he applied for and was qualified for an available position; (3) he suffered an adverse employment decision; and (4) similarly situated individuals not in the protected class were treated more favorably. *St. Mary's Honor Ctr. v. Hicks*, 509

U.S. 502, 506 (1993). The only significant difference in the FEHA analysis is that in order to establish a prima facie case, Plaintiff must, in addition to the first three elements, demonstrate some other circumstances that suggests discriminatory motive. *See, e.g., Guz*, 24 Cal.4th at 355.

If Plaintiff succeeds in establishing a prima facie case, the burden of production then shifts to Bayer to articulate a legitimate, nondiscriminatory reason for terminating Plaintiff's employment. *See McDonnell Douglas*, 411 U.S. at 802. If Bayer does so, Plaintiff must demonstrate that Bayer's articulated reason is a pretext for unlawful discrimination by "'either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Plaintiff's evidence must be both specific and substantial to overcome the legitimate reasons set forth by the employer. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002).

1. Prima Facie Case.

At summary judgment, the degree of proof necessary to establish a prima facie case is "minimal and does not even need to rise to the level of a preponderance of the evidence." *Lyons v. England*, 307

F.3d 1092, 1112 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). Although the burden for establishing a prima facie case is an easy one to satisfy, Plaintiff has failed to do so. Although Plaintiff's race makes him a member of a protected class and his failure to be promoted and termination qualify as adverse employment actions,[1] he fails to satisfy the other two prongs of the test; that is, to demonstrate that he was qualified for the position and that other, similarly situated individuals not in the protected class were treated more favorably.

a. Plaintiff has failed to demonstrate that he was qualified for the position.

There is simply no evidence in the record that Plaintiff was qualified for the position of Level A mechanic. Plaintiff's disciplinary record indicates that, due to his performance record and disciplinary actions, he was not qualified for promotion. In addition, the record demonstrates that there were numerous times when Plaintiff's performance on the job was unsatisfactory. The record is replete with instances of

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[1]As Plaintiff conceded at oral argument on this motion, because Plaintiff was terminated at the time he applied for a promotion the claims for discrimination in failing to promote him collapse under the same rubric as his termination claim.

complaints about Plaintiff's work from fellow employees and supervisors. (*See, e.g.*, Roberts Decl. at ¶¶ 9-10; Schreibstein Decl., Ex. A at 122-30.) There were complaints about a confrontational altercation with another mechanic, repeated complaints about Plaintiff's poor attitude and work performance from coworkers, Plaintiff's failure to follow strict company policy on equipment release and lockout/tagout procedures, his missing days of work and failing to show up for a particular, time-sensitive work assignment. (*See, e.g.*,Smith Decl. at ¶¶ 6-8; Schreibstein Decl., Ex. A at 165-68.) In addition, just prior to his termination, Plaintiff's supervisor determined that Plaintiff had completed the paperwork indicating some filters had been changed, but could not account for the fact that, upon visual inspection, it appeared that the there remained dirty filters in the unit. (*See* Schreibstein Decl., Ex. A at 203-209, 223-24, Ex. B at JON1715-16, JON1717; Smith Decl. at ¶¶ 14-15.)[2]

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[2]To the extent that Plaintiff attempts to rehabilitate his former testimony by submitting a declaration in connection with opposing the motion for summary judgment in which he unequivocably attests that he changed the filters (Jones Decl. at ¶ 26), such testimony is self-serving and contradicts his former sworn testimony in which he stated it was highly unlikely that he would not have changed the filters (Schreibstein Decl., Ex. A at 224). A party cannot create a triable issue of fact, and thus survive summary judgment, by contradicting his own deposition testimony with a later declaration. *Disc Golf*

Based on this evidence, the Court finds that Plaintiff has failed to demonstrate that there is a genuine dispute of material fact regarding his qualifications. Therefore, the Court finds that Plaintiff has failed to establish a prima facie case of discrimination based on demonstrating Plaintiff was qualified for the position. *See Hicks*, 509 U.S. at 506.

b. Plaintiff has failed to demonstrate that other, similarly situated individuals were treated more favorably.

In addition, Plaintiff has failed to raise a dispute of fact regarding whether other employees outside of his protected class were treated more favorably. In this regard, Plaintiff contends that during his tenure in the HVAC Department, he was treated differently from other, non-African American employees because of a delay in ordering his uniform, the failure timely to provide him with tools and failing to give him a two-way radio. (*See* Jones Decl. at ¶ 12.) Plaintiff also contends that he was assigned to work with someone

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Ass'n v. Champion Discs, 158 F.3d 1002, 1008 (9th Cir. 1998). Thus, Defendant's objections to those portions of Plaintiff's declaration that contradict his previous sworn testimony is sustained. Regardless of the filters incident, however, there is ample other evidence in the record indicating that Plaintiff was not performing within the qualifications required of his job.

who was moody and hard to work with and he was therefore unable to learn more on the job. (*See id.* at ¶ 13.) Also, in his complaint before the EEOC, Plaintiff contended that he was denied access to tools, training and the internet. (*See* Schreibstein Decl., Ex. C at JON0060.)

However, there is no evidence in the record that the delay in ordering a uniform or the alleged delay in providing tools or failure to provide a two-way radio or access to the internet impeded Plaintiff's performance on the job. In fact, Plaintiff so testified. (*See* Schreibstein Decl., Ex. A at 268-69, 281.) Further, during his testimony, Plaintiff was unable to identify anyone else, similarly situated, who was treated more favorably with respect to the provision of a uniform, training or tools, discipline, or the level at which others were hired and promoted in the HVAC department. (*See id.* at 237-38, 240-43, 244-48, 271-75; 195; 304-311, 313, 317.)

Because there is no evidence that other, similarly situated individuals were treated more favorably based upon their race, the Court finds that Plaintiff has not met his burden to demonstrate the existence of a prima facie case of race discrimination based on this factor. Therefore, summary judgment on Plaintiff's claim is properly granted.

However, even assuming *arguendo* that Plaintiff had established a prima facie case of race

discrimination, summary judgment is still warranted because Bayer has asserted a legitimate, nondiscriminatory reason for Plaintiff's termination, and Plaintiff has failed to demonstrate the reason is merely pretext.

2. Bayer Has Demonstrated Legitimate Business Reasons for Terminating Plaintiff.

Even if Plaintiff could successfully establish a prima facie case of race discrimination, the undisputed facts demonstrate that Bayer had legitimate business reasons for failing to promote him and instead terminating him. First, Plaintiff has proffered no evidence to demonstrate that he was qualified for promotion to level A mechanic. Second, Plaintiff's record of disciplinary problems is sufficient to establish a legitimate business reason for the determination that he should be terminated. The articulated reasons for Bayer's failure to advance and instead to terminate Plaintiff were based on the application of objective, lawful criteria and were not related to Plaintiff's race.

3. Plaintiff Fails to Raise an Issue of Disputed Fact Regarding Pretext.

Because Defendant presents evidence demonstrating a legitimate nondiscriminatory reason for the failure to promote and termination, Plaintiff

bears the burden of demonstrating that Defendant's articulated reason is pretextual. Plaintiff may do so "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1437 (9th Cir. 1990) (internal cites and quotations omitted).

The Court has already determined that the undisputed evidence demonstrates that Plaintiff failed to perform his duties in compliance with Bayer's expectations and explicit standard operating procedures. Plaintiff fails to refute Bayer's legitimate non-discriminatory reasons for termination and himself admits numerous times that he has no direct evidence that a discriminatory reason motivated his employer. (*See, e.g.*, Schreibstein Decl., Ex. A at 220-21, 229-235, 283-93.)[3]

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[3]Bayer's brief makes a passing reference to a comment that Plaintiff believed intimated race discrimination. (*See* Motion at 3-4.) First, the specific comment Plaintiff complains of regarding his failure to maintain eye contact does not indicate any racial animus. However, even assuming there was some racial content to the comment, it constituted a mere stray remark. *See Mondero v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005) (holding that stray remarks not acted upon or communicated to a decision maker are insufficient to establish pretext); *see also Merrick v. Farmers Ins. Group*,

Plaintiff also contends that he may infer race discrimination from the fact that he was the only African-American in the HVAC department. The Court is not persuaded by Plaintiff's argument that the Court should infer racial animus because the group fails to constitute a statistical sample. The Ninth Circuit has held that a sampling of such a small universe detracts from the value of statistical evidence. *See Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976) ("statistical evidence derived from an extremely small universe ... has little predictive value and must be disregarded.") (citations and internal quotations omitted); *see also Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir.1986) (finding that a department of 28 employees was too small for statistical analysis of race under Title VII); *but see Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005) (holding that considerations of small sample size may detract from the value of such evidence, but such statistical evidence may be probative).

Therefore, the Court finds that Plaintiff has failed to set forth any direct or indirect evidence to persuade the Court that a discriminatory reason more likely motivated the employer or any indirect evidence tending to demonstrate that the employer's proffered explanation is unworthy of credence. *See Merrick*, 892 F.2d at 1437. Having failed to raise a disputed fact

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892 F.2d 1434, 1438-39 (9th Cir. 1990) (same).

demonstrating that Bayer's articulated reason for termination is pretextual, either directly or indirectly, the Court grants summary judgment on Plaintiff's first, third, fifth and sixth claims for race discrimination.[4]

C. Plaintiff's Claims for Retaliation Do Not Survive Summary Judgment.

In his second and seventh causes of action, Plaintiff also makes claims for relief for retaliation. Similar to elements of establishing discrimination, the elements of a retaliation claim "require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [action]." *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992). In order to establish a prima facie case of retaliation,

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[4]Plaintiff's ninth claim for violation of public policy in violation of Article I, Section 8 of the California Constitution fails. To state a claim for termination in violation of public policy, an employee must allege (1) an employer-employee relationship; (2) termination of employment; (3) the termination was a violation of public policy; (4) the termination was the legal cause of the plaintiff's damages; and (5) damages. *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167, 172 (1980). Because Plaintiff's claims of discrimination fail, there is no basis for alleging a violation of public policy.

the plaintiff must show that (1) he engaged in a protected activity, (2) his employer subjected him to adverse employment action, and (3) there is a causal link between the protected activity and the employer's action. *Id.; see also Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002) (same).

Plaintiff maintains that he engaged in protected activity when he filed an internal complaint and EEOC charges. (*See* Schreibstein Decl., Ex. C at JON0060.) Plaintiff's complaint was originally filed on June 24, 2002. (*See id.*) The EEOC initially dismissed the charges based on lack of evidence in December 2002. (*See id.*, Ex. D at JON0057.) After consideration of late-filed submissions interpreted as a request for reconsideration, the EEOC denied Plaintiff's request as insufficient in January 2003. (*See id.* at Ex. A at 389-390, 392-93.)

To the extent Plaintiff claims that his complaints and alleged protected activity ultimately caused his termination, the long passage of time between the alleged protected acts (the filing of the original EEOC complaint in June 2002) and the termination in January 2003 preclude a finding of causal nexus. *See, e.g., Manatt v. Bank of America*, 339 F.3d 792, 802 (9th Cir. 2003) (holding that nine-month period of time between protected activity and alleged retaliatory action was too long to create an inference of retaliation); *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (noting

that a court may not infer causation from temporal proximity unless the time between an employer's knowledge of protected activity and an adverse employment action is "very close" and citing cases for the proposition that a three-month and four-month time lapse is insufficient to infer causation). Therefore, Plaintiff fails to make out a prima facie case of retaliation.

However, even if Plaintiff were able to make out a prima facie case of retaliation, the Court finds that Bayer has articulated a legitimate, nonretaliatory explanation for its acts, and Plaintiff cannot show that Bayer's proffered explanation is merely a pretext for illegal action. Bayer has articulated a legitimate basis for terminating Plaintiff due to his disciplinary and performance record. Plaintiff has failed to demonstrate that Bayer's proffered reason is mere pretext for unlawful discriminatory or retaliatory motive for the same reasons he has failed to so demonstrate for his claims of race discrimination and because he lacks even temporal proximity to create an inference of retaliatory motive. Therefore, the Court grants summary judgment on Plaintiff's second and seventh claims for retaliation.

D. The After-Acquired Evidence Rule as Independent Basis for Summary Judgment.

The after-acquired evidence rule serves as a complete or partial defense to an employee's claim of

wrongful discharge. It comes into play when, after an employee's termination, the employer learns of the employee's wrongdoing that would have resulted in the employee's discharge in any event. *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 520, 632 (1995). To invoke this doctrine, the employer must establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it. The employer must show that such a firing would have occurred as a matter of settled company policy. *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845-46 (1998), citing *Waag v. Thomas Pontiac Buick, GMC, Inc.*, 930 F. Supp. 393, 408 (D. Minn. 1996).

Bayer has submitted a declaration from the manager of Human Resources indicating that Plaintiff would have been fired according to settled policy had the company known that he had misrepresented his qualifications on his job application. (*See* O'Driscoll Decl. at ¶ 3.) Plaintiff's admitted falsifications on his application materials would have, according to settled Bayer policy, been grounds for immediate termination. Therefore, the Court finds that, on this independent basis, Bayer is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Defendant Bayer's motion for summary judgment is GRANTED. Judgment shall be entered in favor of Defendant and

against Plaintiff.

IT IS SO ORDERED.

Dated: March 21, 2007

JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVON JONES, Jr.,

Plaintiff - Appellant,

v.

BAYER HEALTHCARE LLC; BAYER CORPORATION,

Defendants - Appellees.

No. 07-15555

D.C. No. CV-03-05531-JSW
Northern District of California, San Francisco

ORDER

Filed January 20, 2009

Before: WALLACE, THOMAS and GRABER, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Judge Thomas and Judge Graber have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.